

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08-CA-058
KASH JERMAINE MCCRADIC	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Richland County Court of
Common Pleas Court Case No. 2007-CR-
0853 H

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: June 1, 2009

APPEARANCES:

For Plaintiff-Appellee:

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Delaney, J.

{¶1} Defendant-Appellant, Kash McCradic, appeals from his convictions of one count of aggravated murder with a firearm specification, an unspecified felony in violation of R.C. 2903.01, two counts of kidnapping with firearm specifications, both felonies of the first degree, in violation of R.C. 2905.01, two counts of murder with firearm specifications, both unspecified felonies, in violation of R.C. 2903.02, and two counts of having a weapon while under a disability, both felonies of the third degree, in violation of R.C. 2923.13. The State of Ohio is Plaintiff-Appellee.

{¶2} On September 14, 2007, Robert “Bo” Annis was at a bar in Ashland, Ohio, with his girlfriend, Brenda Weitzel. Bo was kicked out of the bar after becoming involved in a fight with another patron. Upon leaving the bar, Bo asked Brenda to drive him to Mansfield so that he could purchase crack cocaine.

{¶3} On their way to Mansfield, Bo called Appellant on his cell phone and left a voice mail message telling Appellant that he was in possession of Appellant’s .38 caliber handgun and that Appellant would not be getting the gun back.

{¶4} Bo unsuccessfully attempted to purchase drugs at several crackhouses in Mansfield before arriving at 280 West Dickson Street, which is a well known drug house in the neighborhood run by a man named Larry Reynolds, a.k.a. “Shorty.”

{¶5} Upon arriving at Shorty’s house, Bo and Brenda went to the basement, where Shorty allowed certain patrons to stay and smoke their drugs. Shorty ran down the street to another house and retrieved a “50” of crack cocaine for Bo.

{¶6} At approximately 2:00 a.m., Appellant arrived at the residence with a group of people, including Khayree Matthews. Multiple witnesses reported that

Appellant was carrying a .45 caliber handgun with him that night. Appellant and Khayree had just returned from a bar called "The Barbershop" where they, too, had been in a fight. Appellant was also expecting trouble that evening because he heard that someone wanted to kill him in retaliation for a robbery.

{¶7} Several of Khayree's friends had also shown up at the house and began to get into an argument with Khayree and Appellant. Appellant pulled his .45 and pointed it at the group and told them to leave the house. Khayree also grabbed a .44 caliber handgun and stepped in between Appellant and the group and told his friends that they needed to leave.

{¶8} After the group left, Khayree and Appellant went down to the basement, where Khayree confronted Bo about owing him 80 dollars. During this confrontation, Bo accused Khayree of taking his laptop computer and told Khayree that he thought they were even. Khayree then took the .44 caliber gun, pointed it at Bo and tried to shoot him. Unbeknownst to Khayree, Shorty had tried to sell that gun earlier in the week and the gun had misfired in Shorty's back pocket, blowing the pocket and leg off of Shorty's pants. Afterwards, Shorty took all of the ammunition out of the .44 and took it back to the residence, where he put it away and did not tell anyone that the gun was not working.

{¶9} Appellant settled the argument between Khayree and Bo by giving Bo the 80 dollars to pay Khayree. Appellant told Bo that Bo could pay him back the next time that he got paid. Appellant and Khayree then returned upstairs.

{¶10} A few minutes later, Appellant listened to his voicemail on his cell phone and got the message from Bo that Bo had his .38. Appellant became extremely angry

and returned to the basement with his cell phone in one hand and the .45 in the other hand to confront Bo about the voicemail. He replayed the message several times, asked Bo where the gun was, and Bo denied leaving the message. Appellant pushed Bo down on to the couch and then shot him repeatedly, emptying the magazine of the .45.

{¶11} Multiple witnesses observed parts or all of this confrontation between Appellant and Bo. Khayree was upstairs with Appellant when Appellant retrieved his voicemail message. Khayree testified that Appellant became very angry and pulled his .45 out and stormed downstairs to confront Bo. Khayree went downstairs with Appellant and witnessed the whole altercation, ending with Appellant shooting and killing Bo. Shorty testified that he was downstairs with Bo and observed Appellant enter the basement, angry and watched Appellant shoot Bo. Brenda and another witness, Bryan Mays, both testified that they were downstairs with Bo and Shorty when Appellant came back downstairs and confronted Bo about the voicemail message. Right before the shots were fired, Brenda and Bryan fled upstairs, but heard the gun being fired.

{¶12} As soon as Appellant began firing shots, Khayree ran upstairs as well. As he was running upstairs, he became aware of other guns being fired outside of the house. When he got upstairs, he saw two other people, Keitha Davis and Patricia Tucker, on the living room floor. Khayree fell to the floor in the kitchen as he got up the stairs. He testified that he saw Bo come up the stairs, bleeding. He watched Bo struggle to get out of the kitchen, but he fell to the floor. Khayree also saw Appellant come up the stairs with the cell phone and gun still in his hands. He testified that the slide was back on the gun, as if Appellant had emptied the magazine.

{¶13} After the shooting, most of the people in the house fled. Brenda drove away in her van and eventually made her way back to Ashland. Khayree and Keitha fled momentarily, but returned to the scene and were arrested for underage consumption. Shorty fled, but returned to the house as soon as he thought it was safe. Bryan Mays fled the scene and did not reappear until two days into trial when he voluntarily appeared and spoke with prosecutors and detectives about what he had witnessed.

{¶14} Detectives interviewed Khayree two separate times. The first time, Khayree lied about what happened because he did not want to snitch on Appellant. After he was charged with felonious assault and attempted murder for attempting to shoot Bo Annis with the .44, he decided to tell officers the truth about what happened that night. He also received a phone call from Appellant a couple of weeks after the shooting, where Appellant told him that he needed Khayree to disappear for about six months.

{¶15} Police also spoke to Shorty, who recited the events as detailed above. Shorty testified that he was standing to the right of Appellant when Appellant fired the shots that killed Bo Annis. As soon as he saw Appellant begin to shoot, he turned to run upstairs. He testified that he heard at least two or three more shots behind him.

{¶16} Brenda testified that after the argument with Khayree, she told Bo that they needed to leave, but Bo refused. She stated that she stayed with him because she did not have any gas or money to return home. They remained in the basement where they continued to smoke crack until Appellant came back downstairs. Brenda testified that as she fled the house as Appellant was shooting Bo, she saw a man get out of a

minivan with a rifle. She stated that she turned in the opposite direction and fled, but she heard gunfire erupt from the alley that she had just come from. As she made her way to her van, she met up with Keitha Davis and Patricia Tucker, who also got into her van, along with Khayree Matthews. She drove them up Third Street, where they got out and went their own way while Brenda went to a friend's house close by and called her ex-husband to pick her up.

{¶17} Brenda found out the next day that Bo had died. She spoke to detectives the day after the shooting and also was able to identify Appellant out of a photo array as the man who shot Bo.

{¶18} Bryan Mays confirmed the events as stated by Brenda and Shorty. When Bryan fled the house, he, too, saw the man with the rifle in the alley. He testified that as he jumped off of the back porch, he heard a "pow pow" and saw a bright light coming out of the basement window. After he crossed the street, he heard multiple shots that were much louder coming from the alley.

{¶19} When Bryan came forward to speak to police during the trial, he agreed to submit a DNA sample, which was matched to a cigarette butt found in the basement of 280 West Dickson.

{¶20} Dr. William Cox, an assistant Franklin County Coroner from Columbus, Ohio, performed the autopsy on Bo Annis. Dr. Cox recovered a "markedly deformed copper jacket lead missile" from behind Bo's ninth rib. The bullet was consistent in size with a .45 caliber round. Dr. Cox testified that in his experience, the massive destruction done to Bo's heart and lung was consistent with the damage done by a .45 caliber bullet.

{¶21} Detectives recovered multiple .45 caliber bullets and casings from the basement of 280 W. Dickson. Two of the bullets were recovered from the couch where Bo was sitting when he was shot. A microscopic comparison of the eight .45 caliber bullets from the basement revealed that all eight had matching breech face marks, indicating that they were all discharged from the same firearm. A comparison of the bullet extracted from Bo's body confirmed that that bullet was also fired from the same firearm as the ones recovered from the residence.

{¶22} Gary Wilgus, an expert in blood spatter analysis from BCI testified that the victim was shot in the basement where there was the least amount of blood. From the pattern of the blood drops, Mr. Wilgus could discern that Bo went upstairs before collapsing and dying on the kitchen floor, where the largest amount of blood was found.

{¶23} Following the murder, Appellant fled to Wisconsin, where he was found based on cell phone records. He was extradited back to Mansfield, where he was charged with the aggravated murder of Bo Annis. He was indicted on two counts of aggravated murder with firearm specifications, one count of kidnapping with a firearm specification, two counts of murder with firearm specifications, and two counts of having a weapon while under disability. Appellant pled not guilty to all counts and exercised his right to a jury trial on all counts.

{¶24} Appellant's case proceeded to trial on June 2, 2008. Appellant was found not guilty on count 1 of the indictment, one of the aggravated murder counts, but was convicted of all remaining counts and specifications. Appellant was sentenced to a total of forty-eight years to life in prison.

{¶25} Appellant raises three Assignments of Error:

{¶26} “I. THE COURT ERRED AS A MATTER OF LAW AND IN VIOLATION OF THE DEFENDANT-APPELLANT’S DUE PROCESS RIGHTS UNDER THE U.S. CONSTITUTION AND OHIO CONSTITUTION, AND OHIO CRIMINAL RULE OF PROCEDURE 16(E)(3) BY PERMITTING THE TESTIMONY OF A SURPRISE WITNESS OVER THE OBJECTION OF THE DEFENDANT.

{¶27} “II. THE TRIAL COURT ERRED IN ADMITTING HEARSAY TESTIMONY IN VIOLATION OF OHIO EVIDENCE RULE 802 AND IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

{¶28} “III. THE TRIAL COURT ERRED IN ADMITTING HEARSAY TESTIMONY IN THE PLAYING OF THE TAPE RECORDING OF THE WITNESS, KHAYREE MATTHEWS’ PREVIOUS STATEMENT, AND FURTHER IN PERMITTING THE CROSS-EXAMINATION OF THE STATE’S OWN WITNESS, LEONARD AJIAN, IN VIOLATION OF OHIO RULES OF CRIMINAL PROCEDURE AND THE DEFENDANT-APPELLANT’S DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION.”

I.

{¶29} In his first assignment of error, Appellant argues that the trial court erred in allowing the State to present testimony of Bryan Mays because Mays was a “surprise” witness. We disagree.

{¶30} Criminal Rule 16 governs discovery procedures to be followed by parties in criminal actions. Specifically, Crim. R. 16(B)(1)(e) states that, upon motion of the defendant, the prosecution must disclose “a written list of the names and addresses of

all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney.”

{¶31} Crim.R. 16(E)(3) provides:

{¶32} “If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.”

{¶33} The Ohio Supreme Court has held when a prosecutor violates Crim.R. 16 by failing to provide the name of a witness, a trial court does not abuse its discretion in allowing the witness to testify where the record fails to disclose (1) a willful violation of the rule; (2) that foreknowledge would have benefitted the accused in the preparation of his or her defense; or (3) that the accused was unfairly prejudiced. *State v. Heinisch* (1990), 50 Ohio St.3d 231, 553 N.E.2d 1026, syllabus; see, also, *State v. Wiles* (1991), 59 Ohio St.3d 71, 79, 571 N.E.2d 97.

{¶34} We do not find that the prosecutor violated Crim. R. 16 in this case. When the prosecutor submitted discovery to the defense, it listed the name of a “Brian _____” with no address because his last name and address were not known. The prosecution gleaned Bryan’s name from two witness statements, which it also provided to the defense in discovery, who placed “Brian” in the basement at the time of the shooting.

{¶35} Prior to the commencement of trial, the prosecution was unable to ascertain “Brian’s” last name in order to locate him and interview him. When Bryan Mays appeared in court two days into trial, the prosecutor immediately notified defense counsel. Mr. Mays was interviewed by the police that day and a transcribed copy of Mr. Mays’ interview was faxed to defense counsel at the same time that the prosecutor received a copy of the statement. There cannot be said to be bad faith when the prosecution was not even able to locate Mr. Mays prior to trial and did not intend to call him until after detectives spoke with him during the trial.

{¶36} The defense objected to the late notice of Mr. Mays’ identity and objected to allowing him to testify at trial. The trial court, in overruling the defense’s objection, stated, “[h]e was known to have been there. He was known by name. There was no * * * surprise in there. Now the only surprise is he’s shown up.”

{¶37} Defense counsel conceded that they had been put on notice that a person named “Brian” was a potential witness. Counsel also conceded that the prosecution had given him open discovery; in other words, the prosecution essentially turned over their whole file to the defense prior to trial, which they are not required to do pursuant to Crim. R. 16(B)(1)(g). Counsel technically would not have been privy to Mr. Mays’ statement until after he testified, but the prosecution, acting in good faith, turned the statement over prior to Mr. Mays’ testimony.

{¶38} Moreover, foreknowledge of Mr. Mays’ identity would not have aided Appellant in the preparation of his defense. Mays’ testimony was largely cumulative of the testimony of Larry “Shorty” Reynolds, Khayree Matthews, and Brenda Weitzel. Mays testified that he was in the basement with Shorty, Brenda, and Bo, and that he

observed Khayree come downstairs and argue with Bo about the 80 dollars that Khayree stated that Bo owed him. He observed Khayree pull out the .44 and try to shoot Bo, which was corroborated by Shorty and Brenda. He testified that Appellant attempted to make peace between Khayree and Bo and then Appellant and Khayree went back upstairs. Mays also testified that he was sitting on the couch next to Bo when Appellant came back downstairs with his cell phone in one hand and his gun in the other hand, angry about a voicemail that Bo had left him. He stated that when Appellant pushed Bo back down to the couch, he jumped up and ushered Brenda upstairs, away from the ensuing shooting. Mays did not witness Appellant shoot Bo, but did see bright lights and what sounded like gunfire from the basement window as he fled the area. All of this testimony was corroborated in some form by the other witnesses at the scene.

{¶39} Additionally, Appellant can prove no prejudice by the admission of Mays' testimony. At trial, defense counsel complained that if he knew that Mays was going to testify, he would have asked Khayree Matthews additional questions when he was cross-examining Khayree. The trial court told defense counsel that he could recall Matthews to the stand if he so desired, but also indicated that counsel was not entitled to Mays' statement during Khayree's initial cross-examination under discovery rules. Counsel declined to recall Khayree to the stand.

{¶40} The trial court was within its discretion to allow Bryan Mays to testify. Accordingly, Appellant's first assignment of error is overruled.

II.

{¶41} In his second assignment of error, Appellant argues that the trial court erred in permitting Detective Bosko to testify as to the identity of Appellant as “Scar Face” based on statements gleaned from witness Leonard Ajian in violation of Evid. R. 802, which states that hearsay is generally inadmissible barring exceptions to this rule.¹

{¶42} In the present case, Appellant finds the following line of questioning to be offensive:

{¶43} “Q: [Attorney Mayer]: Did there come a time during the course of your investigation that you found out who Scarface is?

{¶44} “A: [Detective Bosko]: Yes.

{¶45} “Q: And who is Scarface?

{¶46} “Mr. Bove: Objection.

{¶47} “The Court: You have to ask him how he found out who Scarface is.

{¶48} “Q: The question, then, is how did you find out who Scarface is, since you said you did find out through the course of your investigation?

{¶49} “A: Through the Richland County Prosecutor’s Office.

{¶50} “Q: And then who is Scarface?

{¶51} “Mr. Bove: Objection.

{¶52} “The Court: Overruled.

{¶53} “A: Kash McCradic.

{¶54} “Mr. Bove: Let me put it on there. He’s got to tell how, not just where. He’s got to tell how.

¹ Appellant cites no case law in support of this argument.

{¶55} “Attorney Mayer: Okay. How did you come about finding out or who told you or how did you find out?”

{¶56} “Attorney Mayer: Then we might have an objection to hearsay.

{¶57} “Detective Bosko: Your office notified me that Leonard Ajian –

{¶58} “Mr. Bove. Objection. There’s documentation or something. It should be–

{¶59} “The Court: You asked how they’re telling you?”

{¶60} “Detective Bosko: Your office contacted me.

{¶61} “Mr. Bove: Your Honor, I’m going to object.

{¶62} The Court: You have objected. Now proceed.

{¶63} “Attorney Mayer: Sustained. Did you sustain the objection?”

{¶64} “The Court: No.

{¶65} “Attorney Mayer: Then proceed. How did you find out?”

{¶66} “Mr. Bove: Objection to hearsay.

{¶67} “Detective Bosko: Your office had advised me that Leonard Ajian had been interviewed just prior to the trial stating that he had now identified Scarface as Kash McCradic being the person on the back porch. * * *

{¶68} “Mr. Bove: Your Honor, I need to put that one on the record.

{¶69} “The Court: You did.

{¶70} “Mr. Bove: I mean after the answer. That should not be with the jury. Real quick.

{¶71} (At the bench) “Mr. Bove: This is what I was referring to when I was up here a very short time ago in that that’s why I objected to it. What we’re doing is putting

somebody or something or some office as verifying that Kash McCradic has been called Scarface without any basis for that. It's all hearsay. You don't know who it was, and that's - - I guess if that's the way it's going to end, that's the way it's going to end. But we've made the prosecutor's office a witness.

{¶72} “Attorney Mayer: My reply to that is, on a number of occasions, Attorney Bove objected and wanted to know how, and the witness did explain how. And I think it's relevant to clear up the situation that happened in court, the fact that the witness was on the stand telling a lie to the jury, and I believe Captain Bosko just clarified that.

{¶73} “Mr. Bove: Let me clarify what it was doing. I thought he was going to talk about it. Came up that the man he was talking about yesterday that has a list of nicknames and things like that, and then I objected again when I realized, no, it wasn't going to be that, it was going to be some time of hearsay from the office. Okay. I'm done.”

{¶74} Based on defense counsel's statements, we find that any admission of hearsay was based upon invited error. The doctrine of invited error holds that a litigant may not “take advantage of an error which he himself invited or induced.” *State v. Campbell* (2000), 90 Ohio St.3d 320, 324, 738 N.E.2d 1178, citing *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, 502 N.E.2d 590, paragraph one of the syllabus. From the transcript, it is clear that defense counsel paved the way for hearsay to come in based on his statement that the prosecutor needed to ask *how* the detective became aware of who Scarface was. The fact that counsel thought that a different answer would be provided does not negate the fact that he invited the error by insisting that a particular question be asked.

{¶75} Moreover, admission of this statement is harmless beyond a reasonable doubt. See Crim. R. 52(A) (Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.). This small portion of testimony in the course of the trial did not affect any substantial right of Appellant. Multiple witnesses placed Appellant at the scene at 280 W. Dickson with a .45 caliber handgun on September 15, 2007. Moreover, these witnesses saw Appellant in the basement arguing with Bo Annis and pointing the .45 caliber handgun at him. Two witnesses saw Appellant shoot Bo Annis and two additional witnesses fled the basement seconds before the shots were fired. A .45 caliber bullet was retrieved from Bo Annis' body during his autopsy and the bullet matched eight other bullets collected from the basement of 280 W. Dickson. All nine bullets and casings were identified as having come from the same .45 caliber gun. Based on the overwhelming evidence of Appellant's guilt, the admission of this hearsay could not have been said to substantially impact the outcome of the trial.

{¶76} Appellant's second assignment of error is overruled.

III.

{¶77} In his third assignment of error, Appellant argues that the admission of a tape recorded statement of Khayree Matthews was improper. Moreover, he argues that it was improper to allow the State to cross-examine its own witness, Leonard Ajan.

{¶78} The admission or exclusion of evidence is a matter left to the sound discretion of the trial court. Absent an abuse of discretion resulting in material prejudice to the defendant, a reviewing court should be reluctant to interfere with a trial court's decision in this regard. *State v. Hymore* (1967), 9 Ohio St.2d 122, 224 N.E.2d 126.

{¶79} Moreover, where counsel fails to object to certain testimony, a plain error standard of review applies. Pursuant to Crim.R. 52(B), “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” The rule places several limitations on a reviewing court’s determination to correct an error despite the absence of a timely objection at trial: (1) “there must be an error, i.e., a deviation from a legal rule,” (2) “the error must be plain,” that is, an error that constitutes “an ‘obvious’ defect in the trial proceedings,” and (3) the error must have affected “substantial rights” such that “the trial court’s error must have affected the outcome of the trial.” *State v. Dunn*, 5th Dist. No. 2008-CA-00137, 2009-Ohio-1688, citing *State v. Morales*, 10th Dist. Nos. 03-AP-318, 03-AP-319, 2004-Ohio-3391, at ¶ 19, quoting *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240; *State v. Gross*, 97 Ohio St.3d 121, 776 N.E.2d 1061, 2002-Ohio-5524, ¶ 45. The decision to correct a plain error is discretionary and should be made “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Barnes*, supra, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.

{¶80} Appellant did not object to the admission of Khayree’s taped statement at trial, therefore we apply a plain error standard of review. Moreover, we find that it was not in error for the trial court to admit the statement, as it was admissible as a prior consistent statement. Ohio Evid. R. 801(D)(1)(b) governs prior consistent statements, and provides that a statement is not hearsay if “[t]he declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * *

consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive. * * *".

{¶81} Ohio courts have held that such implications during opening statements are sufficient to allow the State's use of Evid. R. 801(D)(1)(b). *State v. Crawford*, 5th Dist. No. 07-CA-116, 2008-Ohio-6260, citing *State v. Abdussatar*, 8th Dist. No. 86406, 2006-Ohio-803, *State v. Johnson* (April 26, 1996), 2nd Dist. No. 15253; *State v. Hoskins* (June 28, 1995), 2nd Dist. No. 94-CA-42 ("attacking a victim's credibility during opening statement has been found to constitute grounds for permitting a prior consistent statement into evidence pursuant to Evid.R. 801(D)(1)(b).").

{¶82} In defense counsel's opening statement, he said:

{¶83} "I am going to talk just briefly to you about this indictment, because it's important. I do want you to know that the biggest decision you will make is who pulled the trigger. That will be the biggest decision that you'll go in there. Not who the choice was, but did they prove that fellow there beyond a reasonable doubt pulled the trigger. They made a deal with the other fellow that tried to kill him earlier, so we know who's there, that there is someone else there who's very capable of murder. And had that gun not misfired, [the Appellant] wouldn't be standing trial here because [Robert Annis] would have been dead by somebody else's hand."

{¶84} Later in his opening statement, defense counsel specifically named Khayree Matthews and more strongly implied that Khayree had an improper motive in testifying against Appellant. Specifically, he said:

{¶85} "Khayree is the one they made the deal with. That's Buck. He already pulled the trigger on the kid once. You're going to find out when they tested him right

afterward that he had gunpowder on his hand. That didn't come from the misfire. His girlfriend was tested for gunpowder. She tested positive.”

{¶86} We agree with the State that such statements by counsel imply that Khayree Matthews had a motive to lie about Appellant's guilt. Defense counsel's statements imply that Khayree Matthews was the person who shot Bo Annis and that he lied to cut a deal with the prosecution.

{¶87} Moreover, the statement in the video was made four to five days after Khayree was arrested, well before the charge of recent fabrication, and his statements on the tape were consistent with his trial testimony. In the video, Khayree stated that Appellant was angry with Bo because of the voicemail left of Appellant's phone regarding a missing gun. He also stated that he was standing near Appellant when the first shot was fired but then fled the basement and that Appellant fired four or five shots at Mr. Annis. Moreover, his statement and his testimony both confirmed that he heard additional shots fired from outside the house as he was running up the stairs, that he saw Bo stumble upstairs before collapsing in the kitchen, and that he saw Appellant come up the basement stairs with his cell phone in one hand and the gun in the other with the slide pulled back as though he had just emptied the magazine.

{¶88} Khayree was subject to cross-examination at trial regarding both statements he made on direct and statements he made during the video. Defense counsel conducted an exhaustive cross-examination of Khayree and focused in on any inconsistencies he could find between the statements to the police, the jail video, and his trial testimony.

{¶89} While we do not find the admission of the statement to be in error, even if it was error to admit the statement, Khayree's testimony was corroborated by other eyewitness accounts of the events that transpired at 280 W. Dickson. As such, Appellant did not suffer any prejudice by the admission of the statement.

{¶90} Appellant next argues that it was improper for the trial court to allow the prosecutor to impeach his own witness. Ohio Evid. R. 607(A) provides, "The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage."

{¶91} Surprise can be shown if the testimony is materially inconsistent with a prior statement, either written or oral, when counsel did not have any reason to believe that the witness would recant his original statement when he was called to testify. See *State v. Holmes* (1987), 30 Ohio St.3d 20, 23, 506 N.E.2d 204. A party has the right to presume that his witnesses will testify consistently with his prior statement unless a witness has indicated to the contrary. *State v. Jarvis*, 12th Dist. No. CA86-07-110. Affirmative damage is established when "the witness testified to facts which contradict, deny or harm the party's trial position." *Ferguson Realtors v. Butts* (1987) 37 Ohio App.3d 30, 33, 523 N.E.2d 534.

{¶92} The decision as to whether a party is taken by surprise is entrusted to the discretion of the trial court. *State v. Blair* (1986), 34 Ohio App.3d 6, 9, 516 N.E.2d 240. In the present case, Leonard Ajian had given a statement to the police in which he identified a person by the name of Scarface as sitting on the back porch of 280 W. Dickson after the shooting on September 15, 2007. He stated that Scarface was

reloading a gun shortly after the shots were fired. In the statement to the police, Ajian stated that Scarface drove a Chevy Lumina, which is similar to the Chevy Corsica that Appellant drove. When Ajian met with prosecutors prior to trial to discuss his testimony, Ajian identified Appellant as Scarface.

{¶93} When the State called Ajian to testify at trial, he recanted his previous statements. On direct examination, he stated that Khayree Matthews was the person sitting on the back porch. When prosecutors asked Ajian on direct who Scarface was, he indicated that he knew Appellant went by that name. Prosecutor Mayer asked Ajian if he recalled giving a statement to Detective Bosko on the morning of September 15, 2007. Ajian indicated that he did. When the prosecutor asked Ajian if he recalled referring to Scarface in that statement, defense counsel objected, arguing that the State was trying to impeach his own witness. Prosecutor Mayer responded, "Yeah, I think I may have to impeach him. When he gave the statement to Detective Bosko, he said Scarface was putting the bullets in the gun. He just identified Scarface as Kash McCradic. Now, he is saying from the witness stand it is Khayree. When he told Eric Bosko Scarface was putting the bullets, that's Kash McCradic. * * * Not only that, when we interviewed him and Bambi, we asked him four or five times who is Scarface. He said it is Kash McCradic."

{¶94} Following the conference at the bench, the prosecutor proceeded to impeach Mr. Ajian with his own statement. When defense counsel continued to object throughout the line of questioning, the trial court stated, "He is impeaching the witness who has changed his testimony. He can go ahead."

{¶95} We find that the trial court properly permitted the State to impeach its own witness given that the State demonstrated surprise and affirmative damage based upon Mr. Ajian's recantation. Appellant's third assignment of error is overruled.

{¶96} For the foregoing reasons, Appellant's assignments of error are overruled. The judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J.

Wise, P.J. and

Edwards, J. concur.

HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
KASH JERMAINE MCCRADIC	:	
	:	
Defendant-Appellant	:	Case No. 08-CA-58
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to appellant.

HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

HON. JULIE A. EDWARDS